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## Rape Trauma Syndrome

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# Forensic Science

## Rape Trauma Syndrome

Paul Giannelli\*

The use of social science research in law is now commonplace, although not without controversy. The phrase "social frameworks" was coined to describe a new use of this research.<sup>1</sup> The term refers to the use of social science research to provide a context for assisting a jury in deciding specific factual issues.<sup>2</sup> For example, social science research concerning the problems associated with eyewitness identifications provides background information that assists a jury in deciding whether the eyewitness's account in a particular case is accurate. Similarly, evidence of the battered woman syndrome provides a context in which to view a self-defense claim. Yet another il-

lustration is rape trauma syndrome, the subject of this column.<sup>3</sup>

### Initial Research

The phrase "rape trauma syndrome" (RTS) was coined in 1974 to describe the behavioral, somatic, and psychological reactions of rape and attempted rape victims.<sup>4</sup> Based on interviews with 146 women, re-

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<sup>1</sup> Walker and Monahan, "Social Frameworks: A New Use of Social Science in Law," 73 Va. L. Rev. 559 (1987).

<sup>2</sup> "We therefore propose a new category, which we term social framework, to refer to the use of general conclusions from social science research in determining factual issues in a specific case." Id. at 570.

<sup>3</sup> See generally Freckelton, "When Plight Makes Right: The Forensic Abuse Syndrome," 18 Crim. LJ 29 (1994); Mosteller, "Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence," 52 Law & Contemp. Probs. 85, 125-128 (Autumn 1989); Stefan, "The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law," 88 Nw. U. L. Rev. 1271 (1994); Vidmar and Schuller, "Juries and Expert Evidence: Social Framework Testimony," 52 Law & Contemp. Probs. 133, 155-160 (Autumn 1989); Comment, "Making the Woman's Experience Relevant to Rape: The Admissibility of Rape Trauma Syndrome in California," 39 UCLA L. Rev. 251 (1991); Annot., "Admissibility, at Criminal Prosecution, of Expert Testimony on Rape Trauma Syndrome," 42 ALR 4th 879 (1985).

<sup>4</sup> Burgess and Holmstrom, "Rape Trauma Syndrome," 131 Am. J. Psychiatry 981 (1974). See also Burgess, "Rape Trauma Syndrome," 1 Behav. Sci. & L. 97 (Summer 1983).

searchers found that victims usually progress through a two-phase process, an acute phase and a long-term reorganization phase. Impact reactions in the acute phase involve either an "expressed style" in which fear, anger, and anxiety are manifested, or a "controlled style" in which these feelings are masked by a composed or subdued behavior. Somatic reactions include physical trauma, skeletal muscle tension, gastrointestinal irritability, and genitourinary disturbance. In addition, a wide gamut of emotional reactions, ranging from fear, humiliation, and embarrassment to anger, revenge, and self-blame are exhibited.

The second phase, the reorganization phase, typically begins two to six weeks after the attack and is a period in which the victim attempts to reestablish her life. This period is characterized by motor activity, such as changing residences, changing telephone numbers, or visiting family members. Nightmares and dreams are common. Rape-related phobias, such as fear of being alone or fear of having people behind one, and difficulties in sexual relationships also are prominent.

Critics questioned the scientific basis for RTS evidence. After surveying the literature, one writer concluded that "definitional problems, biased research samples, and the inherent complexity of the phenomenon vitiate all attempts to establish empirically the causal relationship implicit in the concept of a rape trauma syndrome."<sup>5</sup> Some of the re-

search problems included (1) unrepresentative samples; (2) failure to distinguish between victims of rapes, attempted rapes, and molestation; and (3) failure to account for individual idiosyncratic and incident-specific reactions.<sup>6</sup> In 1989, a psychologist concluded that "research on the rape trauma syndrome is not probative on prior consent, prior trauma, nor the cause of the complainant's current behavior."<sup>7</sup>

### Later Research

"Subsequent research, which is much more rigorous, conceptualizes rape trauma in terms of specific symptoms rather than more general stages of recovery."<sup>8</sup> The syndrome is now recognized as a type of post-traumatic stress disorder (PTSD), and such disorders are included in the most recent edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*.<sup>9</sup> This approach to RTS, however, does not focus on the two-stage model of recovery posited by the early researchers, but rather on specific symptoms.

<sup>6</sup> Id. at 1678-1680.

<sup>7</sup> Graham, "Rape Trauma Syndrome: Is It Probative of Lack of Consent?" 13 L. & Psych. Rev. 25, 41-42 (1989).

<sup>8</sup> Frazier and Borgida, "Rape Trauma Syndrome: A Review of Case Law and Psychological Research," 16 Law & Hum. Behav. 293, 299 (1992).

<sup>9</sup> A.P.A. Diagnostic and Statistical Manual of Mental Disorders 247 (3d ed. rev. 1987) ("Post-traumatic Stress Disorder"). Another disorder sometimes mentioned in these cases is "conversion disorder." Id. at 257. See *State v. Hall*, 412 SE 2d 883, 891 (NC 1992) (discussing conversion disorder and RTS).

<sup>5</sup> Faigman, "Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings," 70 Va. L. Rev. 1657, 1678 (1984).

Although victims of RTS experience a range of symptoms, only a few symptoms have been studied consistently: fear and anxiety, depression, social maladjustment, and sexual dysfunction. Recent studies also document symptoms identified for PTSD—recurrent nightmares, irritability, and hypervigilance.<sup>10</sup> Two researchers concluded:

In our opinion, although early studies were plagued by numerous methodological problems . . . , several studies have since been conducted that are much more sophisticated methodologically . . . . These studies have assessed victim recovery at several points after the assault using standardized assessment measures and have employed carefully matched control groups. This research has established that rape victims experience more depression, anxiety, fear, and social adjustment and sexual problems than women who have not been victimized. Research on PTSD among rape victims is more recent but consistently suggests that many victims experience PTSD symptoms following an assault. Initially high symptom levels generally abate by 3 to 4 months post-assault, although significant levels of distress continue for many victims.<sup>11</sup>

In evaluating this research, its underlying purpose is critical. The focus of much of the research was to understand the victim's reactions in order to provide assistance to the

victim, not to evaluate a victim's reactions in order to establish the fact that a rape had occurred, which is how RTS evidence is sometimes used at trial. There is an accepted body of research concerning the aftereffects of rape. The critical issue, however, is how the research is used in court.

### Expert Testimony

Researchers have also reviewed expert testimony in the reported cases. In several instances, they found testimony that was unsupported by research. For example, in *Lessard v. State*,<sup>12</sup> the expert testified that it is "very common" for a victim to ask an assailant not to tell anyone about the assault. Writers have concluded that "this particular behavior has not been documented in the research literature."<sup>13</sup> Their conclusions concerning court testimony are noteworthy:

In sum, experts in recent cases have described a broad range of symptoms and behaviors as consistent with RTS, some of which do not appear to be based on research. Testimony that is not research based often seems to be prompted by a defendant's claims that a complainant's behavior was inconsistent with having been raped. If virtually any victim behavior is described as consistent with RTS, the term soon will have little meaning. Indeed, some critics have argued that this already is the case. . . .<sup>14</sup>

<sup>10</sup> Frazier and Borgida, *supra* note 8, at 300.

<sup>11</sup> *Id.* at 301.

<sup>12</sup> 719 P2d 227, 233 (Wyo. 1986).

<sup>13</sup> Frazier and Borgida, *supra* note 8, at 304.

<sup>14</sup> *Id.* at 304–305.

*Jury Studies*

Social scientists have also attempted to determine whether the typical jury is generally knowledgeable regarding the aftereffects of rape, and what the impact of expert testimony concerning this subject will have on a jury. One study administered an 18-item questionnaire concerning sexual assault to two groups of experts: rape and PTSD experts.<sup>15</sup> The responses of the experts were then compared to those of two nonexpert groups (students and nonacademic university staff). The nonexpert groups scored markedly lower on the questionnaire than did the experts—near chance levels (57 percent and 58 percent correct).<sup>16</sup> Significantly, the nonexperts were unaware of the behavioral changes a victim often experiences following a rape.<sup>17</sup> This study suggests that jurors often need to be informed about this subject to understand the evidence.

Other studies<sup>18</sup> have focused on the impact RTS testimony has on jurors. These experiments suggest that RTS testimony has a greater impact when introduced early in trial rather than later. The writers concluded:

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<sup>15</sup> Frazier and Borgida, "Juror Common Understanding and the Admissibility of Rape Trauma Syndrome Evidence in Court," 12 *Law & Hum. Behav.* 101 (1988).

<sup>16</sup> *Id.* at 112.

<sup>17</sup> *Id.* at 114.

<sup>18</sup> Brekke and Borgida, "Expert Psychological Testimony in Rape Trials: A Social-Cognitive Analysis," 55 *J. Personality & Soc. Psycho.* 372 (1988); Borgida and Brekke, "Psycholegal Research on Rape Trials," in *Rape and Sexual Assault: A Research Handbook* 313 (A. Burgess ed., 1985).

Expert testimony, when presented early in the trial, may serve as a powerful organizing theme or basis for a juror's initial impression of the case. When presented later in the trial, by contrast, the expert testimony may be treated merely as additional information to be integrated into an existing, well-organized impression.<sup>19</sup>

A second finding was that expert testimony had a greater impact if it was "concretized" through the use of a case-specific hypothetical question. The more general testimony consisted of an attempt to debunk many of the common myths concerning rape. The expert in the experiments testified that: (1) few women falsely accuse men of rape; (2) rape is a highly underreported crime; (3) a large proportion of rapes involve casual acquaintance of the victim rather than strangers; (4) rape is a crime of violence rather than a crime of passion; and (5) it is often better for a woman to submit than to risk the additional violence that could result from ineffective resistance. When this testimony was followed by a hypothetical question incorporating the important features of the case, it had a greater impact.<sup>20</sup>

The studies also indicated that jurors did not automatically accept the expert's testimony, and that expert testimony was important in acquaintance rape and lack of physical resistance situations.

**Evidentiary Use**

RTS evidence may be offered at trial to prove lack of consent by the

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<sup>19</sup> Brekke and Borgida, *supra* note 18, at 383.

<sup>20</sup> *Id.*

alleged victim, and to explain postincident conduct by a victim that a jury might perceive as inconsistent with the claim of rape. The courts divide regarding the first use, but generally accept the second. In addition, RTS evidence has been offered by the defense to prove a lack of rape. Defendants have also sought to have alleged victims examined psychiatrically to determine RTS symptoms.

### Admissibility: Lack of Consent

A number of courts permit RTS evidence to be introduced at trial to establish lack of consent, an element of the crime of rape. The inference may be stated as a syllogism: (1) Rape victims manifest certain characteristics known as RTS; (2) the alleged victim has these symptoms; and (3) therefore she has been raped.

In 1982, in *State v. Marks*,<sup>21</sup> the Kansas Supreme Court became the first state supreme court to uphold the admission of RTS evidence. A psychiatrist, who examined the victim two weeks after the attack, testified that the victim had suffered a "frightening assault" and was "suffering from the post-traumatic stress disorder known as rape trauma syndrome."<sup>22</sup> The court concluded:

An examination of the literature clearly demonstrates that the so-called "rape trauma syndrome" is generally accepted to be a common reaction to sexual assault. . . . As such, qualified expert psychiatric

testimony regarding the existence of rape trauma syndrome is relevant and admissible in a case such as this where the defense is consent.<sup>23</sup>

Other courts follow this precedent.<sup>24</sup> In addition, Illinois enacted a statute that permits the admission of evidence of posttraumatic stress syndrome in illegal sex acts prosecutions.<sup>25</sup>

Different courts have imposed a variety of limitations on this use of RTS evidence. Some courts permit the expert to testify that the victim's behavior was *consistent with* RTS but not that the victim had been raped.<sup>26</sup> Other courts prohibit (1)

<sup>23</sup> *Id.* at 1299.

<sup>24</sup> E.g., *State v. Huey*, 699 P2d 1290, 1295 (Ariz. 1985); *State v. Gettier*, 438 NW2d 1, 6 (Iowa 1989); *State v. Allewalt*, 517 A2d 741, 751 (Md. 1986); *State v. Liddell*, 685 P2d 918, 922-923 (Mont. 1984); *State v. Whitman*, 475 NE2d 486, 488 (Ohio Ct. App. 1984); *State v. Schumpert*, 435 SE2d 859, 862 (SC 1993) ("[E]xpert testimony and behavioral evidence are admissible as rape trauma syndrome to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect.").

<sup>25</sup> 725 Ill. Con. Stat. 5/115-7.2 (West 1992).

<sup>26</sup> E.g., *People v. Eiskant*, 625 NE2d 1018, 1021 (Ill. App. Ct. 1993) ("The preferred testimony is whether or not the victim exhibited symptoms, behaviors, or characteristics consistent with the syndrome in question."); *State v. Alberico*, 861 P2d 192, 210 (NM 1993) ("[Post Traumatic Stress Disorder] testimony is admissible for establishing whether the alleged victim exhibits symptoms of PTSD that are consistent with rape or sexual abuse"; however, this testimony may not be offered to show victim is telling the truth and expert may not testify regarding identity of perpetrator or mention rape trauma syndrome).

<sup>21</sup> 647 P2d 1292 (1982).

<sup>22</sup> *Id.* See also *United States v. Carter*, 2 MJ 771, 775 (ACMR 1986) (RTS satisfies *Frye*), *aff'd in part*, 26 MJ 428 (MA 1988).

comment concerning the credibility of the alleged victim,<sup>27</sup> (2) use of the term "rape trauma syndrome,"<sup>28</sup> or (3) any reference to the accused.<sup>29</sup> Still other courts have demanded rigorous qualifications for experts in this context.<sup>30</sup>

Courts rejecting RTS as proof of lack of consent dispute the scientific validity of the syndrome when offered for this purpose. In *State v. Saldana*,<sup>31</sup> the Minnesota Supreme

Court ruled that "[r]ape trauma syndrome is not the type of scientific test that accurately and reliably determines whether a rape has occurred."<sup>32</sup> Other courts exclude RTS evidence because it has not been generally accepted by the scientific community as required by the *Frye* test.<sup>33</sup> For example, in *People v. Bledsoe*,<sup>34</sup> the California Supreme Court noted that "rape trauma syndrome was not devised to determine the 'truth' or 'accuracy' of a particular past event—i.e., whether, in fact, a rape in the legal sense occurred—but rather was developed by professional rape counselors as a therapeutic tool, to help identify, predict and treat emotional problems experienced by the counselors' clients or patients."<sup>35</sup> Thus, according to the court, although generally accepted by the scientific community for a therapeutic purpose, expert testimony concerning RTS was not generally accepted "to prove that a rape, in fact, occurred."<sup>36</sup> The court commented:

[A]s a rule, rape counselors do not probe inconsistencies in their clients' descriptions of the facts of the incident, nor do they conduct independent investigations to determine whether other evidence corroborates or contradicts their clients' renditions. Because their function is to help their clients

<sup>27</sup> E.g., *State v. Brodniak*, 718 P2d 322, 326–329 (Mont. 1986) (RTS evidence admissible, but expert may not comment on victim's credibility); *Taylor v. Commonwealth*, 466 SE2d 118, 122 (Va. Ct. App. 1996) (The expert "did not testify about any details of the attack, give the victim's version of the offense, or testify that she believed that victim was telling the truth. . . . We hold that evidence of an emotional or psychological injury such as posttraumatic stress disorder, like medical evidence of physical injury, is relevant as circumstantial evidence of the occurrence of a traumatizing event."); *State v. McCoy*, 366 SE2d 731, 737 (W. Va. 1988).

<sup>28</sup> *State v. Allewalt*, 517 A2d 741, 751 (Md. 1986) (avoiding term RTS is "more than cosmetic").

<sup>29</sup> E.g., *State v. Huang*, 394 SE2d 279, 284 (NC Ct. App. 1990) (RTS evidence admissible, but expert's repeated implication of defendant was prejudicial error), rev. denied, 399 SE2d 127 (NC 1990).

<sup>30</sup> In *State v. Willis* (888 P2d 839 (Kan. 1995)), the Kansas Supreme Court ruled that a licensed social worker was not qualified "to diagnose medical and psychiatric conditions such as post-traumatic stress disorder. . . . Such testimony should be limited to experts with training in the field of post-traumatic stress disorder and rape trauma syndrome and possessing the professional qualifications to make appropriate diagnoses thereof." Id. at 845.

<sup>31</sup> 324 NW2d 227 (Minn. 1982).

<sup>32</sup> Id. at 229. Accord *State v. McGee*, 324 NW2d 232, 233 (Minn. 1982).

<sup>33</sup> For a discussion, see 1 Paul Giannelli and Edward Imwinkelried, *Scientific Evidence* ch. 1 (2d ed. 1993).

<sup>34</sup> 681 P2d 291 (Cal. 1984).

<sup>35</sup> Id. at 300.

<sup>36</sup> Id. at 301.

deal with the trauma they are experiencing, the historical accuracy of the client's descriptions of the details of the traumatizing events is not vital in their task.<sup>37</sup>

Other courts accept this reasoning.<sup>38</sup>

### Admissibility: Explaining Behavior

As noted previously, the California Supreme Court in *Bledsoe* rejected RTS evidence when offered to prove lack of consent. The court, however, approved the admissibility of RTS evidence when the defendant suggested to the jury that the conduct of the victim after the incident was inconsistent with the claim of rape. In this situation, the court wrote, "expert testimony on rape trauma syndrome may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of popular myths."<sup>39</sup>

<sup>37</sup> Id. at 300. See also *People v. Coleman*, 768 P2d 32, 48-49 (Cal. 1990) (reaffirming *Bledsoe*).

<sup>38</sup> E.g., *Spencer v. General Elec. Co.*, 688 F. Supp. 1072, 1075-1077 (ED Va. 1988); *People v. Taylor*, 552 NE 2d 131, 138 (NY 1990) (RTS "is inadmissible when it inescapably bears solely on proving that a rape occurred"); *State v. Hall*, 412 SE2d 883, 890 (NC 1992); *People v. Pullins*, 378 NW2d 502, 505 (Mich. Ct. App. 1985) (RTS fails *Frye* test); *State v. Taylor*, 663 SW2d 235, 240 (Mo. 1984); *State v. Ogle*, 668 SW2d 138, 143-144 (Mo. Ct. App.), cert. denied, 469 US 845 (1984); *State v. Black*, 745 P2d 12, 15-18 (Wash. 1987) (RTS fails *Frye* test).

<sup>39</sup> 681 P2d at 298. See also *State v. Freney*, 637 A2d 1088, 1093 (Conn. 1994) (expert testimony in kidnapping

Most courts accept this position. For example, expert testimony has been admitted to explain a victim's (1) passive resistance during a rape,<sup>40</sup> (2) delay in reporting the crime,<sup>41</sup> and (3) calm demeanor after an attack.<sup>42</sup> RTS evidence has also been introduced to explain that "in the context of a trust relationship, such as a doctor-patient relationship, some victims may return to the trusted relationship for further

and sexual assault case that complainant's conduct (e.g., failing to make escape attempts) was consistent with that of other assault victims).

<sup>40</sup> E.g., *United States v. Houser*, 36 MJ 392, 400 (CMA 1993) (Expert testified "that in some rape cases the victim would fail to report the offense immediately, fail to resist and show no appearance of anxiety."), cert. denied, 114 S. Ct. 182 (1993); *Perez v. State*, 653 SW2d 878, 882 (Tex. Ct. App. 1983) (in rebuttal, expert explained alleged victim's passive resistance during rape).

<sup>41</sup> E.g., *DeLuca v. Lord*, 858 F.Supp. 1330, 1340 (SD 1994) (expert testimony that "rape victims often do not 'cry out' to the first person they see following a rape, and initially try to resume their normal activities with no mention of the assault" held inadmissible in homicide trial because the justification defense was not offered at trial); *United States v. Peel*, 29 MJ 235, 241 (CMA 1989) (RTS evidence admitted to explain postattack behavior—delay in reporting and attempts to normalize life), cert. denied, 493 US 1025 (1990); *People v. Hampton*, 746 P2d 947, 951-952 (Colo. 1987) (RTS evidence admissible to explain delay in reporting).

<sup>42</sup> E.g., *People v. Taylor*, 552 NE2d 131, 138 (NY 1990) ("[H]alf of all women who have been forcibly raped are controlled and subdued following the attack"); *State v. Robinson*, 431 NW2d 165, 172 (Wis. 1988) (many victims are "emotionally flat" immediately after assault).



contact with the perpetrator of the assault."<sup>43</sup>

In *People v. Yates*,<sup>44</sup> the court applied the New York rule admitting RTS evidence to explain a male defendant's reaction to an alleged homosexual attack. The court noted: "A review of literature describing the effect of sexual assault on men reveals that male victims, both heterosexual and homosexual, exhibit a well defined trauma syndrome similar to and parallel to that found in female victims of rape."<sup>45</sup> The court also commented that a "common characteristic of male and female rape victims is delay in reporting the crime."<sup>46</sup>

### Admissibility: Offered by the Defense

In *Henson v. State*,<sup>47</sup> the Indiana Supreme Court held that a defendant may offer RTS evidence to show that the victim had not been raped. The alleged victim claimed that she had been raped at knife point after leaving a bar. She returned to the same bar the next evening for two hours and a drink. The defendant offered the testimony of an expert to comment on her postattack conduct. The trial court excluded the evidence, but the Supreme Court reversed, saying:

Here, Dr. Gover's testimony would have tended to prove that J.O.'s behavior after the incident was inconsistent with that of a victim who had suffered a traumatic rape such as that J.O. recounted. The evidence therefore would have a tendency to make it less probable that a rape in fact occurred. . . .<sup>48</sup>

This result is a logical extension of those cases that admit RTS evidence to show lack of consent. If the evidence is reliable enough for that purpose, it is also (so the argument goes) to show consent. The problem is that it should not be admitted for either purpose. As one court has noted:

While it appears that testimony regarding rape trauma syndrome can be useful in explaining the unusual behaviors that the syndrome comprises, especially where those behaviors would mislead the jury, it does not follow that the converse is true. . . . [S]ome victims exhibit few, if any, symptoms, and . . . different victims exhibit symptoms during vastly different time frames.<sup>49</sup>

### Psychological Examinations of Victims

Another consequence of admitting RTS evidence concerning the issue of consent is the defendant's

<sup>43</sup> *Commonwealth v. Mamay*, 553 NE2d 945, 951 (Mass. 1990). See also *Simmons v. State*, 504 NE2d 575, 579 (Ind. 1987) (initial false report consistent with RTS).

<sup>44</sup> 637 NYS2d 625 (NY Sup. Ct. 1995).

<sup>45</sup> *Id.* at 627.

<sup>46</sup> *Id.* at 628.

<sup>47</sup> 535 NE2d 1189 (Ind. 1989).

<sup>48</sup> *Id.* at 1191. See generally Note, "Defense Expert Testimony on Rape Trauma Syndrome: Implications for the Stoic Victim," 42 *Hastings LJ* 1143 (1991).

<sup>49</sup> *State v. Jones*, 615 NE2d 713, 718-719 (Ohio Ct. App. 1992).

right to have the victim examined by a defense expert to determine whether RTS is an accurate diagnosis.<sup>50</sup> Some courts hold that trial courts lack the authority to order such examinations.<sup>51</sup> Others use a "substantial need" test.<sup>52</sup>

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<sup>50</sup> See Montoya, "A Theory of Compulsory Process Clause Discovery Rights," 70 Ind. LJ 845, 884-888 (1995); Comment, "A Fourth Amendment Approach to Compulsory Physical Examinations of Sex Offense Victims," 57 U. Chi. L. Rev. 873 (1990); Annot., "Necessity or Permissibility of Mental Examination to Determine Competency or Credibility of Complainant in Sexual Offense Prosecutions," 45 ALR 4th 310 (1986).

<sup>51</sup> E.g., *State v. Gabrielson*, 464 NW2d 434, 436 (Iowa 1990). In *State v. Horn* (446 SE2d 52, 53-54 (NC 1994)), the North Carolina Supreme Court ruled that a trial court lacks authority to compel an unwilling witness to submit to a psychiatric examination. The court, however, did note that the trial court has other alternatives: (1) appointment of a defense mental health expert to review findings of psychological evaluations already performed on the victim; (2) preclusion of admission of prosecution's psychological evidence; and (3) dismissal of case.

<sup>52</sup> In *Keeney v. State* (850 P2d 311, 315 (Nev. 1993)), the court stated that, "it would be error to preclude a defendant from having an alleged child-victim examined by an expert in psychiatry or psychology if: (1) the State has employed such an expert; (2) the victim is not shown by compelling reasons to be in need of protection; (3) evidence of the crime has little or no corroboration beyond the testimony of the victim; and (4) there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity." See also *Virgin Islands v. Leonard A.*, 922 F2d 1141, 1143-1144 (3d Cir. 1991); *State v. RW*, 514 A2d 1287, 1291 (NJ 1986); *State v. Redd*, 642 A2d 829, 835 (Del. Super. 1993)

Defendants have challenged the refusal to order an examination on constitutional grounds. The Ninth Circuit, however, has ruled that a trial court's refusal to order psychiatric examinations of two young sexual assault victims to determine whether they exhibited signs of Rape Trauma Syndrome did not violate due process.<sup>53</sup> A different issue may be presented, however, if the prosecution uses an expert. The Nevada Supreme Court has held:

[U]nless competent evidence presents a compelling reason to protect the victim, it is error to deny a defendant the assistance of a defense psychologist or psychiatrist to examine the child-victim and testify at trial when the State is provided such assistance.<sup>54</sup>

Basing its decision on due process, the Illinois Supreme Court has held that "unless the victim consents to an examination by an expert chosen by the defendant, the State may not introduce testimony from an *examining* expert that the victim of an alleged sexual assault suffers from

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(" 'substantial need' criterion is an amplification of, and is not inconsistent with, Delaware's 'compelling' reasons standard"); *State v. Camejo*, 641 So. 2d 109, 113 (Fla. Ct. App. 1994) (per curiam) ("Florida law accords with the majority rule in other jurisdictions that trial courts have the inherent power to order psychological examinations. . . . [C]redibility may be a reason to order such an examination, but only if *there is strong and compelling evidence.*").

<sup>53</sup> *Gilpin v. McCormick*, 921 F2d 928, 931 (9th Cir. 1990).

<sup>54</sup> *Lickey v. State*, 827 P2d 824, 826 (Nev. 1992).

a 'recognized and accepted form of post-traumatic stress syndrome.'"<sup>55</sup>

Again, this issue is avoided if RTS evidence is restricted to its proper use: to explain that the victim's postrape behavior (i.e., de-

layed reporting) is not inconsistent with the crime of rape. Under this theory of admissibility, there is no need to examine this victim.

## Conclusion

Rape remains one of the most unreported crimes. Only slowly is the public recognizing that it is a crime of violence, which in its most profound sense has little to do with human sexuality. The evidentiary use of RTS evidence offers an important way to dispel some of the myths concerning rape victims. In contrast, to use this research to establish lack of consent, rather than to explain behavior, is without scientific support and also opens the door to defense proffers of the lack of RTS to show consent and to requests for psychiatric examinations of victims.

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<sup>55</sup> *People v. Wheeler*, 602 NE2d 826, 833 (Ill. 1992). See also *State v. Maday*, 507 NW2d 365, 372 (Wis. Ct. App. 1993) ("When the state manifests an intent during its case-in-chief to present testimony of one or more experts, who have personally examined a victim of an alleged sexual assault, and will testify that the victim's behavior is consistent with the behaviors of other victims of sexual assault, a defendant may request a psychological examination of the victim."); *State v. Schaller*, 544 NW2d 247, 252 (Wis. Ct. App. 1995) (*Maday* distinguished; prosecution witnesses here did not examine the alleged victim, but simply described characteristics of battered women).